Supreme Court, U.S.
FILED
JUL 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LARRY L. McKINNON,

Petitioner,

v.

CITY OF BERWYN, a municipal corporation, JOHN CAITHAMER, ROGER MONTORO, NICHOLAS SALERNO, SAMMY CANERDAY, and RONALD VOLANTI,

Respondents.

BRIEF OF RESPONDENT CITY OF BERWYN IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ADDITIONAL STATEMENT OF THE CASE

Procedural Facts

After an appeal, the Petitioner's claims under 42 U.S.C. § 1983 against Respondents City of Berwyn and Police Officer Roger Montoro, were re-tried on the issue of dam-

ages in August, 1985. On retrial, the jury returned a verdict of compensatory damages against both Respondents and a verdict of punitive damages against Officer Montoro. A Rule 58 judgment was entered on the court's civil docket on August 28, 1985.

Thereafter, the Respondents filed timely post-trial motions under Rule 59(e) which stayed the time during which an appeal could be taken from the judgment on the merits until a ruling on the Respondents' post-trial motions. While the post-trial motions were pending, Petitioner's counsel filed his petition for attorney's fees under 42 U.S.C. § 1988 in the district court on October 16, 1985.

On July 30, 1987, the district court issued an order and memorandum opinion disposing of all pending motions. In a single order, the court denied the Respondents' post-trial motions; awarded Petitioner attorney's fees under 42 U.S.C. § 1988; and denied a motion previously filed by Petitioner requesting that the punitive damage award entered against the officer be enforced against the City. Accordingly, a Rule 58 judgment was docketed on August 4, 1987.

On August 11, 1987, the Plaintiff-Petitioner filed three motions, each of which related solely to the issue of Section 1988 attorney's fees. Those motions included a petition for additional attorney's fees; a petition to enforce the attorney's fee award against the City of Berwyn; and, a petition for prejudgment interest on the attorney's fees which had been awarded on July 30, 1987. None of the three motions filed by the Petitioner was styled as a Rule 59(e) motion nor as a motion to alter or amend the judgment order of August 4, 1987. The Petitioner filed no motion related to the judgment on the merits.

On March 3, 1988, the district court entered an order awarding the Petitioner additional attorney's fees and awarding the Petitioner interest on the Section 1988 attorney's fee award.

On March 17, 1988, the Petitioner filed his notice of appeal in the district court. The notice of appeal did not seek review of any issues related to Section 1988 attorney's fees or the district court order of March 3, 1988. Rather, the notice of appeal sought review of an order of the trial court entered prior to the retrial pursuant to the mandate of the Seventh Circuit; of a portion of the order of July 30, 1987 memorializing Petitioner's non-acceptance of a remittitur and his request for a new trial; and that portion of the same order refusing his request to enforce the punitive award against the City.

ARGUMENT

The Petitioner has incorrectly stated the issue upon which review is being sought as follows:

> The question presented in the instant case, therefore, is whether the Petitioner's filing of an appropriate Rule 59(e) motion as to the attorney's fee award portion of the August 4 judgment, suspended the finality of the entire judgment. (Petitioner's brief, p. 7).

The issue as stated by the Petitioner somewhat misses the mark, for that statement of the issue assumes that Petitioner's motion for prejudgment interest on an award of Section 1988 attorney's fees constituted a Rule 59(e) motion to alter or amend the judgment. The issue is simply whether, under the facts and circumstances of this case,

the Petitioner's motion for prejudgment interest on his Section 1988 fee award filed August 11, 1987, suspended the finality of the judgment on the merits which was entered on July 30, 1987, and docketed on August 4, 1987. In short, does a motion directed to an order on a collateral matter (the award of fees) stay the judgment on the merits, for it is a review of the merits that was being sought in the Court of Appeals.

The Petitioner's petition is premised upon the erroneous characterization of his motion for prejudgment interest on his Section 1988 fee award as a Rule 59(e) motion to alter or amend a final judgment.

To the contrary, the Petitioner's motion for prejudgment interest on his award of attorney's fees was not a Rule 59(e) motion which brought into play the operation of Federal Rule of Appellate Procedure 4(a)(4), and, therefore, the time to appeal from the judgment on the merits (which became final and appealable on August 4, 1987) was not stayed. It is the Respondent's contention that since a fee petition is a collateral matter, any motion relating to an order on a collateral matter does not stay the underlying judgment of the merits.

In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162 (1982), this Court held that a motion for attorney's fees under 42 U.S.C. § 1988 is not a motion under Rule 59(e), the latter being a motion which addresses only matters properly encompassed in a decision on the merits. A request for attorney's fees under 42 U.S.C. § 1988 "raises legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply." *Id.*, 455 U.S. at 451. Because a motion for attorney's fees requires an inquiry separate from the decision on the merits, an attorney fee

award is "uniquely separable" from the underlying cause of action. *Id.*, 455 U.S. at 452.

That a question may remain concerning the recoverability or the amount of attorney's fees under 42 U.S.C. § 1988 will not prevent a judgment on the merits from being final. *Budinich v. Becton Dickinson & Co.*, 486 U.S. ____, 108 S.Ct. 1717, 1721-22 (1988). In *Budinich*, this Court unanimously stated:

> We are not inclined to adopt a position that requires the merits or non-merits status of each attorney fee provision to be clearly established before the time to appeal can be clearly known. Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a "final decision" for purposes of Section 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case. (108 S.Ct. at 1722).

In this case, the Petitioner attempts to distinguish *White* and *Budinich* on the basis that "the attorney's fee award here was 'embodied' in the final order which the plaintiff was seeking to 'alter' ". (Petitioner's brief, p. 6). The thrust of the Petitioner's argument is that because the final judgment on the merits also contained an ancillary award of Section 1988 attorney's fees and because his motion for prejudgment interest on his attorney's fee award was filed within ten days of the final judgment on the merits, that motion acted as a Rule 59(e) motion which stayed the time for appeal. The distinction suggested by the Petitioner is meaningless and grossly deviates from this Court's holdings in *White* and *Budinich*.

If, in fact, issues related to an attorney's fee award are truly collateral to the decision on the merits, then it is wholly immaterial when attorney's fees are awarded—it

is of no significance whether they are awarded at the same time as the judgment on the merits or whether they are awarded subsequent to the judgment on the merits. There exists no juridical basis for arguing that the issue may be transformed into a non-collateral issue depending upon when a ruling is made or depending upon the form of the ruling. Form should not be exaulted over substance.

The Petitioner's motion for prejudgment interest on the attorney's fees awarded was not denominated as a Rule 59(e) motion nor was it styled as a motion to alter or amend the judgment. The motion did not request the trial court to alter or amend the judgment on the merits in any way. In fact, the motion for prejudgment interest on the attorney's fees awarded did not seek to alter or amend the substance of the already awarded fees.

The motion in question was merely a supplemental request for taxation of additional costs. Because almost two years had elapsed between the submission of his fee petition and the order awarding fees in August, 1987, the Petitioner requested that interest be awarded on the fees.

The recovery of those additional costs to be taxed against the non-prevailing parties are provided for in neither the language nor the history of 42 U.S.C. § 1988. The Plaintiff's request for prejudgment interest on the attorney's fees awarded was simply a request for taxation of additional costs which was addressed to the inherent, equitable powers of the court. *See, e.g., Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777 (1939). The requested taxation of additional costs amounted to an independent, supplemental proceeding, and, the district court, in the exercise of its federal common law powers, could have entertained such a motion at any time. The court was not bound by any ten-day limitation in

ordering additional taxation of costs. Alternatively, the motion was simply a request for a fee enhancement necessitated by the unexpected delay in the ruling. *Missouri v. Jenkins*, ____ U.S. ____, 57 U.S.L.W. 4735 (1989).

Petitioner has cited to the court several decisions from various Circuit Courts of Appeal which have held that a motion for prejudgment interest must be brought under Rule 59(e). (Petition at p. 6). Each of those cases is inapposite to the issue now before the Court, inasmuch as each of those decisions dealt with requests for prejudgment interest on money damages awarded in the judgment on the merits.

In *Osterneck v. Ernst & Whinney*, ____ U.S. ____, 57 U.S.L.W. 4212 (1989), this Court held that a post-judgment motion for discretionary prejudgment interest on a final judgment on the merits is a Rule 59(e) motion which would render ineffective any notice of appeal filed during the pendency of the motion. In *Osterneck*, this Court limited its holding to post-trial motions for prejudgment interest on the underlying judgment resulting from a decision on the merits of the case, as such a motion involves reconsideration of matters encompassed within the merits of a judgment to which Rule 59(e) was intended to apply. This Court carefully distinguished the issue then before the court from a request for attorney's fees under Section 1988 which raises legal issues wholly collateral to, and separable from, a decision on the merits.

It is illogical to say that a motion for Section 1988 attorney's fees, which is collateral to the merits judgment, does not constitute a Rule 59(e) motion, but that a request for interest on that award does amount to a Rule 59(e) motion.

The conclusion of the Seventh Circuit that the decision on the merits became final and appealable on August 4, 1987, is consistent with the "practical", "pragmatic" approach to the issue of finality which is favored by this Court. *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 73 S.Ct. 245, 249 (1952); *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 1513 (1962). Application of a pragmatic approach requires that, in order for a motion to suspend appealability from a final judgment, the post-judgment motion must seek an "alteration of the rights adjudicated" in the court's judgment. *Department of Banking v. Pink*, 317 U.S. 264, 63 S.Ct. 233, 234 (1942). Relative to the practical test for determining finality, this Court stated, in *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., supra*, as follows:

> [W]hile we do not mean to encourage applications for piecemeal review by today's decision, we do mean to encourage applicants to this court to take heed of another principal—the principal that litigation must at some definite point be brought to an end. It is a principal reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review. (73 S.Ct. at 249, 250).

Because the Petitioner's motion for prejudgment interest on his award of attorney's fees did not seek to alter or amend the substance of the final judgment in any way, that motion cannot be considered as a Rule 59(e) motion. Just as importantly, the motion for prejudgment interest on the award of attorney's fees was of no import to the

matters for review, as asserted in the Petitioner's notice of appeal.

In the petition, the Plaintiff states that a "common sense" application of the Federal Rules of Civil Procedure and the language of the Seventh Circuit in *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 739 F.2d 284 (7th Cir. 1984), would dictate that a notice of appeal not be filed until a ruling upon the "motion to amend." (Petitioner's brief, p. 8). That statement totally ignores the preferred practice which has been sanctioned by, and mandated by, the Seventh Circuit Court of Appeals for many years. Had the Plaintiff timely filed his notice of appeal, the district court would have retained jurisdiction to entertain any motion related to attorney's fees or costs. *Cf. Buchanan v. Stanships, Inc.*, 108 S.Ct. 1130 (1988).

The rule in the Seventh Circuit has been that, because an award of attorney's fees is a decision "distinct from the decision on the merits", the district court's reservation of issues relating to attorney's fees will not impede the finality of the judgment on the merits. *Terket v. Lund*, 623 F.2d 29, 33-34 (7th Cir. 1980); *Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555 (7th Cir. 1975). Therefore, the filing of a notice of appeal does not divest the district court of jurisdiction to consider such ancillary matters as awarding costs or attorney's fees under 42 U.S.C. § 1988. In *Terket*, the Seventh Circuit Court of Appeals gave the following notice to attorneys who practice in this circuit:

> [D]istrict courts in this circuit should proceed with attorney's fees motions, even after an appeal is filed, as expeditiously as possible. Any party dissatisfied with the court's ruling may then file an appeal and apply to this court for consolidation with the pending appeal of the merits. (623 F.2d at 34).

Although the Petitioner has belatedly characterized his motion for prejudgment interest on the attorney's fees awarded as a motion to alter or amend the judgment, it is the substance of the motion which controls in determining whether a post-judgment motion constitutes a motion brought under Rule 59(e). *Bank of California v. Arthur Andersen & Co.*, 709 F.2d 1174, 1176 (7th Cir. 1983).

CONCLUSION

Because the Petitioner's post-judgment motion amounted to nothing more than a collateral claim for taxation of additional costs, the time for appeal from the final judgment on the merits was not tolled. As a result, the decision of the Seventh Circuit Court of Appeals entered on October 24, 1988 was correct. Therefore, it is requested that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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